well as additional costs and operational impediments associated with the manual processes used to interconnect certain network elements, may make it impossible as a practical matter for a competitor to provide services in the local market quickly and on a wide-spread basis."[59] Thus, the impair standard is not met simply because some competitors have constructed new facilities, because these competitors may nonetheless be impaired in their ability to provide the services that they seek to offer.

Rather than a simple count of competitors or alternative facilities, the impair standard requires the Commission to determine whether a wholesale market exists for a particular element or self-provisioning is a "viable substitute" to the ILECs' network elements.[60] In other words, the Commission must **compare** the use of UNEs with "self-provision" or with purchase from another provider, which is dependent upon the development of a wholesale market.[61] As part of this comparative analysis, the Commission considers, among other things, the factors of cost, timeliness, quality, and ubiquity. It is striking, yet not surprising, that the Joint Petition does not provide any comparative evidence with respect to these factors.

With respect to cost, for example, the Commission explained that it "consider[s] not only the direct costs, but also other costs and impediments associated with using alternative elements that may constitute barriers to entry."[62] "Additional costs, such as the costs a competitive LEC incurs to connect its own facilities to the incumbent LEC's unbundled network

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59 *Id.*

60 *Id.* at ¶ 56. Although the Commission concluded that the "impair standard is not met only once it is determined that a wholesale market exists for a particular element, it found that it must "consider elements available from all sources, including those elements available from third-party suppliers and through self-provisioning." *Id.*

61 *Id.* at ¶ 70. The Commission also rejected the argument of the ILECs that it can "require unbundling only where the 'necessary' or 'impair' standards have been met." *Id.* at ¶ 102.

62 *Id.* at ¶ 6 (emphasis added).

elements, affect the extent to which an alternative element is available as a practical and economic matter, such that a requesting carrier can actually use the element to provide the service it seeks to offer."[63]

The Joint Petition is completely silent with respect to the comparative cost of entering using UNEs as opposed to using self-provided facilities or facilities provided by third parties. With respect to high-capacity loops, the Joint Petition asserts merely that the costs of installing high-capacity loops are "manageable" because other CLECs and competitive fiber providers have installed their own facilities, and that fixed wireless "permits CLECs to reduce expenses . . . ."[64] With respect to dedicated transport, the Joint Petition alleges simply that "each CLEC does not need to deploy an entire interoffice network" and that "other marketplace [and technological] developments are dramatically reducing the costs of deploying alternative fiber facilities."[65] These baseless assertions miss the point of the impair standard, because they do not address the relative costs of entering using UNEs as opposed to using self-provided facilities or facilities provided by third parties. Accordingly, even if the Joint Petition were accurate, and it is not, it would not demonstrate that the costs and impediments associated with using alternative or self-provided elements do not impede entry by requesting carriers.

The Joint Petition is similarly deficient with respect to time to provision. The impairment standard requires consideration of whether, as a general matter, "there is an identifiable difference in the amount of time required to provide service using an alternative element such that the delay would materially diminish the competitor's ability to provide the

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63 *Id.* at ¶ 79.

64 Joint Petition at 14-16.

65 *Id.* at 23-25.

services that it seeks to offer."[66] The Commission has recognized that ILECs can take advantage of delays caused by the unavailability of unbundled network elements by using their unique access to most customers to gain a foothold in new markets, and, in markets where services may be offered pursuant to long-term contracts to lock-up customers in advance of competitive entry.[67] The Commission has also explained that "unbundled access to certain unbundled incumbents' network elements will accelerate initially competitors' development of alternative networks because it will allow them to acquire sufficient customers and necessary market information to justify the construction of new facilities."[68] Moreover, the Commission "may consider whether an unbundling obligation is likely to encourage requesting carriers to rapidly enter the local market and serve the greatest number of customers."[69]

With respect to high-capacity loops, the Joint Petition asserts simply that there is a wholesale market from which carriers can rapidly obtain capacity, and that fixed wireless reduces time to market. With respect to dedicated transport, the Joint Petition claims that the Commission's concerns about timeliness "have been substantially ameliorated" because allegedly collocation has increased, the time to implement collocation requests has declined, collocation hotels have proliferated, and all carriers are affected by delays in accessing rights of way.[70] Again, the Joint Petition actually fails to address the impair standard, because it does not address the relative time needed to enter a market when using UNEs as opposed to using self-provided facilities or facilities provided by third parties. Accordingly, even if the Joint Petition

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66 UNE Remand Order at ¶ 95.

67 *Id.* at ¶ 91.

68 *Id.* at ¶ 112.

69 *Id.* at ¶ 108.

70 Joint Petition at 25-27.

were accurate, and it is not, it would not demonstrate that the time needed to enter the market using alternative or self-provided elements does not impede entry by requesting carriers.

Although the Joint Petition claims to address quality and network operations issues, they provide nothing apart from bare assertions that quality and network operations are no longer a concern.[71] The Joint Petition does not even attempt to provide any data support these assertions, let alone a comparison of the quality and network operations issues associated with using UNEs as opposed to using self-provided or alternative facilities.

In sum, the Joint Petition is defective not only because it fails to satisfy the impair standard, but also because it fails to even address the impair standard. Accordingly, the Commission should deny the Joint Petition as soon as possible in order to restore certainty to the marketplace.

III. THE JOINT PETITION IS INCONSISTENT WITH THE GOALS OF THE ACT

The Joint Petition claims that continuing to require access to unbundled high-capacity loops and dedicated transport will deter facilities-based competition and investment in broadband facilities.[72] Specifically, the Joint Petitioners argue that section 706 requires the Commission to lift the unbundling obligation for high-capacity loops and dedicated transport in order to promote advanced services despite that fact that competitors are impaired under section 251 without access to these network elements.[73] The Joint Petitioners' interpretation places two provisions of the Act – sections 251 and 706 – into direct conflict with one another, giving the

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71 *See id.* at 16-17, 28.

72 *See id.* at 29-32.

73 *See id.*

more general provision – Section 706 – priority over the more specific provisions – sections 251(c)(3) and 251(d).

The Joint Petitioners' interpretation is inconsistent with the explicit language of the statute, contrary to the Commission's interpretation of sections 251 and 706, and inconsistent with canons of statutory construction. The explicit language of sections 706 and 251 can easily be interpreted as consistent with each other, as the Commission concluded in the UNE Remand Order. The "impair" standard that the Commission adopted pursuant to section 251 "will encourage the development of facilities-based competition," which will facilitate the deployment of advanced services as section 706 requires[74] As the Commission explained in the UNE Remand Order

> To encourage competition among carriers to develop and deploy new advanced services, the marketplace for these services must be conducive to investment, innovation, and meeting the needs of consumers. Accordingly, our unbundling rules are designed to facilitate the rapid and efficient deployment of all telecommunications services, including advanced services."[75]

The Commission expects that "over time competitors will prefer to deploy their own facilities in markets where it is economically feasible to do so, because it is only through owning and operating their own facilities that competitors have control over the competitive and operational characteristics of their service, and have the incentive to invest and innovate in new technologies that will distinguish their services from those of the incumbent."[76]

The interpretation that the Joint Petition urges is unnecessary. The better interpretation is that section 706 is consistent with sections 251(c)(3) and 251(d), and that

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74 UNE Remand Order at ¶ 71.

75 *Id.* at ¶ 14.

76 *Id.* at ¶ 7.

application of the statutory impair standard will further the goals of section 706. Canons of statutory interpretation establish that where two interpretations are possible, the one that harmonizes provisions must be adopted.[77] Even if sections 706 and 251 were in conflict with each other, and they are not, the more specific provision – section 251 – overrides the more general provision – section 706. This interpretation is also consistent with the Commission's analysis in the UNE Remand Order.

In addition to being inconsistent with the explicit language of the 1996 Act, the claims of the Joint Petitioners about the effect on the rollout of advanced services are simply untrue. Unbundling of high-capacity loops and dedicated transport will promote the deployment of advanced services, as the Commission concluded in the UNE Remand Order.

The fallacy of the reasoning in the Joint Petition is highlighted by the internal consistencies that plague it. For example, on one hand, the Joint Petition claims that unbundling restricts investment and innovation, claiming that it unfairly subjects ILECs to all of the risk while letting competitors piggyback without the risk.[78] On the other hand, the Joint Petition claims that there is so much capacity that there is "a vibrant wholesale market for high-capacity loops and dedicated transport . . . 'an avalanche of metro capacity being deployed.'"[79]

In reality, grant of the Joint Petition would halt "smart build" CLEC expansion. CLECs would not add any new collocations, because they could not connect the new collocations to the rest of their network without dedicated transport. This is true even if the Joint

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77 *See, e.g., Illinois Commerce Commission v. Interstate Commerce Commission*, 879 F.2d 917, 926-27 (D.C. Cir. 1989)("An established rule of statutory construction . . . counsels an interpretation, whenever possible, reconciling and giving operative effect to all provisions of the statute.").

78 Joint Petition at 6.

79 *Id.* at 3.

Petition's claims that alternative dedicated transport exists in every central office in which a CLEC is collocated – and that it were in sufficient supply and quality – were accurate, and it is not. Under the Joint Petitioners' own reasoning that the competitive transport market is an "inverse field of dreams" (because allegedly "carriers will build if customers come"), the competitive fiber providers will not build to offices where no CLECs are collocated and CLECs will not collocate if they cannot get transport. This is a classic chicken and egg problem. Thus, the only effect of the Joint Petition would be to permit ILECs to coerce CLECs into converting UNEs into special access facilities – at higher, tariffed prices. For this reason, it makes no sense to allow the ILECs to impose higher prices on CLECs from UNEs they are receiving today.

IV. THE JOINT PETITION IS NOT SUPPORTED BY THE FACTS

The Joint Petition asks the Commission to ignore the UNE Remand Order and lift the unbundling requirement for high-capacity loops and dedicated transport on the basis of baseless assertions made in the USTA Report and unsupported by affidavit. This so-called "fact" report, which was prepared on behalf of USTA by a lawyer for the ILECs, is an evidentiary farce that should not be accorded any weight, as AT&T and others have demonstrated.[80]

Rather than relying on independently verifiable raw data, the USTA Report merely cites unverifiable news reports, press releases and financial reports.[81] Worse yet, the USTA Report improperly manipulates the data mentioned in these snippets and does not explain

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80 *See, e.g.*, Reply Comments of AT&T Corp., CC Docket No. 96-98 (filed April 30, 2001).

81 *See, e.g., id.*

the methodology used to develop its "findings."[82] This is the most probable explanation for the lack of a sworn affidavit vouching for the accuracy of the USTA Report.

Each of the four principal "competition" figures in the USTA Report are fundamentally flawed. AT&T has already demonstrated the following errors in the USTA Report:[83]

- ***Market Share:*** The USTA Report used a black box methodology to calculate a CLEC special access market share of 36 percent in 2000, which would represent a three percent increase since 1999. However, the Commission's own data demonstrate that the CLEC special access market share was actually 21.8 percent in 2000, which represents a 2.1 percent increase since 1999. Moreover, most of this market share represents resale, not facilities-based special access services, which would be far smaller.
- ***Fiber Deployment:*** The USTA Report relies predominantly on *long haul* fiber to imply that CLECs have access to over 200,000 route miles of non-incumbent fiber. Because *long haul* fiber is no substitute for the incumbent LEC *local* facilities at issue in the Joint Petition, the figures that the USTA Report cites are worthless. Moreover, the USTA Report's estimate is further inflated by improper double- and even triple-counting of alternative fibers. Once these errors are eliminated, the data show that there has been only a modest deployment of alternative local fiber.
- ***Building Penetrations:*** The USTA Report's claim that CLECs have access to 25 percent of the commercial office buildings in the Nation is patently false. In reality, CLECs have access to *less than 6 percent* of the commercial office buildings in the Nation, and access to many of these buildings is limited to particular floors or customers.
- ***Collocations:*** The availability of competitive alternatives cannot be based on the number of collocations established in a particular area, as the USTA Report suggests. For example, AT&T demonstrates that a majority of its collocation sites use ILEC facilities and virtually all of the 5,000 collocation sites of DSL providers rely on ILEC provided high capacity loops and transport. Moreover, the USTA Report assumes without support that CLECs are able to obtain collocation arrangements efficiently, use them for all types of equipment, and interconnect them with whomever they want. However, the truth is that even where CLECs are able to obtain a collocation arrangement, they are not able to use them for all types of equipment or interconnect their equipment with whomever they want. As yet another example of the Joint

82 *See, e.g., id.*

83 *See, e.g., id.* at iv-v.

> Petitioners' hypocrisy, they cite the Petition of Competitive Fiber Providers for Declaratory Ruling of Sections 251(b)(4) and 224(f)(1) as evidence of market success, yet they ignore the point of the petition, which is that competitive fiber providers are thwarted because ILECs will not let them into the central office.

As AT&T has demonstrated, the USTA Report could not be further from the truth. Duplicating ILEC high-capacity loops and dedicated transport would be almost impossible.

The Commission should also deny the Joint Petition for the same reasons that it denied the petitions that U S West and other BOCs filed in late 1998 and early 1999 seeking forbearance from dominant carrier regulation in the provision of certain special access and high-capacity transport services.[84] The BOC petitioners asserted that they no longer possessed market power in the provision of special access and high-capacity dedicated transport services in specific markets because there allegedly was sufficient competition to prevent them from raising prices above competitive levels.[85] In support of their petitions, the BOCs relied heavily on market analyses prepared by Quality Strategies, Inc., which purported to show substantial competition for special access and high-capacity transport services.[86]

The Commission denied the BOCs' petitions, holding that they had failed to provide the Commission and interested parties a meaningful opportunity to examine the conclusions in the Quality Strategies market reports, because they did not provide sufficient information with their petitions concerning the market share conclusions contained in the reports. The Commission explained that petitioners "must provide more than just general conclusions about market conditions so that interested parties have a meaningful opportunity to refute, and

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84 *See Petition of U S West Communications, Inc. For Forbearance from Regulation as a Dominant Carrier*, 14 FCC Rcd 19947 (1999), *rev'd on other grounds, AT&T Corp. v. FCC*, 236 F.3d 729 (D.C. Cir. 2001).

85 *See id.* at ¶ 22.

86 *See id.* at ¶ 23.

this Commission has a meaningful opportunity to evaluate," the claims upon which the petition is based.[87] The Commission concluded that it could not rely on the BOC petitioners' market share information because "they did not provide any raw data underlying the market share claims presented in Quality Strategies' reports, thus making it impossible for parties to refute the calculations contained therein."[88]

As with the BOCs' petitions in the U S West Order, the data in the USTA Report are not sufficiently complete and verified to be given credibility. The USTA Report was prepared by outside counsel, and some of the internal statistics have no sources cited – they are simply data that the Joint Petitioners are presenting to the Commission, and the Commission has to take their word for it that the data are accurate. Accordingly, the Commission should deny the Joint Petition for the same reasons that it denied the BOCs' petitions in the U S West Order.

Even if the claims that the Joint Petition makes about CLEC investment were accurate, and they are not, they would be irrelevant given the current state of the market. If a CLEC makes an investment but cannot provide service profitability, the investments can hardly be relied upon as evidence that the CLECs are not impaired without access to ILEC-supplied UNEs. Rather than demonstrating that requesting carriers are not impaired without access to UNEs, the current state of the market demonstrates that the ILECs have refused to comply with the Act, and the Commission's enforcement efforts have been insufficient. As a result, CLECs have been forced to build their own facilities, despite impairment, in order to have a hope to stay in the industry. Current market conditions provide confirmation that the Commission must enforce the Act before it is too late. Under no circumstances may the alleged CLEC investment

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87 *Id.* at ¶ 25.

88 *Id.*

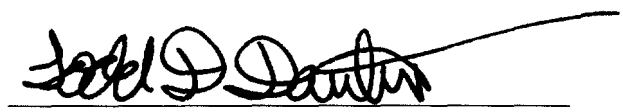
that the Joint Petition and USTA Report cite be used as the basis for removing UNE requirements with which the ILECs have yet to comply.

CONCLUSION

For the foregoing reasons, the Commission should promptly deny the joint petition of BellSouth, SBC and Verizon.

Respectfully submitted,

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

By: 

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Dated: June 11, 2001

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-98
Local Competition Provisions of the	)	
Telecommunications Act of 1996	)	
	)	

COMMENTS OF

THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

The time has come to lift the illegal restrictions on the use of EELs that the Commission imposed in the *Supplemental Order* and extended in the *Supplemental Order Clarification*. Since issuing the *UNE Remand Order*, the Commission has charted a tortuous path towards ever more complicated use restrictions on EELs with increasingly vague and remote policy justifications. The Commission took this path despite the fact that use restrictions violate the plain and unambiguous language of the 1996 Act, as the Commission itself has repeatedly recognized.

Time has proven the wisdom of Congress's decision not to tolerate any type of restriction on the use of UNEs. In the 18 months since the Commission imposed the use restrictions, EELs have largely been unavailable to competing carriers for ***any*** services, despite the fact that the Commission intended to restrict the use of EELs only in certain situations. Requesting carriers, including those that carry a "significant amount of local exchange traffic," have been forced to order EEL-equivalent services (*e.g.*, T1 loops, multiplexing and transport) out of the ILECs' tariffs as higher-priced special access services.

There is absolutely no rational public policy basis for imposing restrictions on the use of EELs. The use restrictions are not necessary to protect universal service, because there are no universal service support subsidies in special access (or even switched access) rates. The only effect of the use restrictions is to guarantee the ILECs a certain revenue stream from their tariffed special access services. However, protecting ILEC revenues is not a permissible policy objective for the Commission. The goal of the Commission must be to promote competition, not to protect incumbent monopoly profit streams.

The use restrictions are also fundamentally inconsistent with the Commission's application of the impair standard, as well as its competitive policies. Those restrictions not only have decreased the speed with which competition is introduced and reduced certainty in all markets due to disputes about whether a competitive carrier meets the qualifications, but also have emboldened ILECs to refuse to provide EELs to ***any*** requesting carriers. Accordingly, few carriers have been able to integrate EELs into their business plans, even if they provide a "significant amount of local exchange service," and entry is delayed because carriers do not have accurate information about the availability of EELs. Moreover, the illegal use restrictions interfere with facilities-based competition because they generate inefficient entry and investments decisions. In any event, the illegal use restrictions are simply not practical from an administrative standpoint because they focus on factors that are beyond the ability of the requesting carrier (and for some options, even the customer) to control or know.

In the end, the losers under the illegal use restrictions are consumers, many of whom are still waiting to see any benefits from the market-opening provisions of the Telecommunications Act of 1996. In fact, the only winners under the illegal use restrictions are ILECs, whose supra-competitive special access prices and monopoly profit stream continue to be shielded from competitive forces by a Commission umbrella, as they have been for over five years. Therefore, the Commission should return immediately to the path charted by Congress when it adopted Section 251 of the 1996 Act – restrictions on the use of UNEs are strictly forbidden – by immediately lifting the use restrictions it imposed on an "interim" basis in the *Supplemental Order* and extended indefinitely in the *Supplemental Order Clarification.*

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-98
Local Competition Provisions of the	)	
Telecommunications Act of 1996	)	
	)	

To: The Commission

COMMENTS OF

THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these comments in response to the Commission's *Public Notice* in the above-captioned proceeding.[1] CompTel is the premier industry association representing competitive telecommunications providers and their suppliers. CompTel's members provide local, long distance, international, Internet and enhanced services throughout the nation. It is CompTel's fundamental policy mandate to see that competitive opportunity is maximized for *all* its members, both today and in the future.

CompTel has long supported the ability of requesting carriers under Section 251 of the Communications Act to use unbundled network elements ("UNEs"), individually and in combinations, without restrictions on the types of services that may be provided. In this

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[1] *Comments Sought on the Use of Unbundled Network Elements to Provide Exchange Access Service*, CC Docket No. 96-98, Public Notice, DA 01-169 (rel. Jan. 24, 2001) ("*Notice*"). *See also Common Carrier Bureau Grants Motion for Limited Extension of Time for Filing Comments and Reply Comments on the Use of Unbundled Network Elements to Provide Exchange Access Service,* CC Docket No. 96-98, Public Notice, DA 01-501 (rel. Feb. 23, 2001) (extending filing dates for comments to April 5, 2001 and for reply comments to April 30, 2001).

proceeding, CompTel has strongly supported the UNE combination of loop, multiplexing, and transport – known as the enhanced extended loop ("EEL") – as an important tool for bringing competition to consumers. However, most incumbent local exchange carriers ("ILECs") have refused for more than five years to provide EELs as required by the statute, and local competition has been thwarted as a result. Unfortunately, the Commission shares some of the fault for this unfortunate state of affairs, because it first looked the other way while ILECs refused to provide EELs and then issued a series of orders imposing ever more complicated "interim" use restrictions on EELs. Those restrictions are patently contrary to the statutory language and the Commission's own rules, and they should be removed immediately.

The wisdom of Congress' approach to UNEs – tolerating no use restrictions on UNEs of any kind whatsoever – has been abundantly proved by recent experience with the Commission's interim restrictions. Although the Commission intended to restrict the use of EELs only for certain services, the result has been that EELs have largely been unavailable to competing local carriers for ***any*** services. Requesting carriers have been forced to order EEL-equivalent services (*e.g.*, T1 loops, multiplexing and transport) out of the ILECs' tariffs as higher-priced special access services. The beneficiaries of these rules have been the ILECs, whose supra-competitive special access prices and monopoly profit stream have been shielded by a Commission umbrella from competitive forces and market entry for more than five years. The losers under these rules are consumers, many of whom are still waiting to see any benefits from the market-opening provisions in Section 251 of the Telecommunications Act of 1996.

During the debates on EELs that led to the *Supplemental Order* and *Supplemental Order Clarification*, the ILECs fooled the Commission, the public and, regrettably, a few CLECs through assurances that they would readily convert special access circuits to EELs so long as the

Commission adopted interim restrictions to prevent a reduction in their special access revenues through EEL conversions by long distance carriers. Based on these assurances, the Commission adopted the requested use restrictions, claiming that the restrictions were "interim" in nature and necessary to protect universal service subsidies. Time has proven both that the ILECs have no intention of providing EELs in a timely and cost effective manner and that the "interim" restrictions do not protect universal service subsidies. The only purpose served by these restrictions is to protect a monopoly revenue stream of the ILECs from being eroded by the market-opening provisions in Section 251. However, the goal of the Commission must be "to promote competition . . . , not to protect competitors."[2] Therefore, the time has come to lift these illegal use restrictions entirely before they do even more damage to competition than they have already done.

BACKGROUND

In the *UNE Remand Order*, the Commission reaffirmed its previous conclusion in the *Local Competition First Report and Order* that Section 251(c)(3) entitles a requesting carrier to use a UNE, or UNE combination, to provide any telecommunications service it seeks to offer.[3] Finding the statutory language "unambiguous," the Commission agreed that the Act does not permit restrictions on a requesting carrier's access to or use of network elements.[4] Accordingly, the Commission reaffirmed Section 51.309 of its Rules, which prohibits ILEC use restrictions.[5]

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2 *CompTel v. FCC*, 87 F.3d 522, 530 (D.C. Cir. 1996), *quoting WATS-Related and Other Amendments of Part 69 of the Commission's Rules,* 59 RR 2d 1418, 1434-35 (1986).

3 In addition, the Commission confirmed again that the Act opens all pro-competitive entry strategies to competitors, allowing them to choose among these strategies as they see fit. *See, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3910-13, ¶¶ 483-89 (1999)("*UNE Remand Order*").

4 *Id.* at ¶ 484.

5 *Id.*

The Commission also clarified that requesting carriers may obtain and use EELs, explaining that requesting carriers are permitted to order this combination under the ILECs' special access tariffs, and convert the pre-existing combination to UNEs pursuant to Section 315(b) of the Commission's rules.[6]

Based upon a flurry of last-minute *ex parte* contacts from ILECs making unsupported allegations that EELs may threaten universal service, the Commission subsequently took the unusual step of issuing a *sua sponte* order imposing a restriction on the use of EELs.[7] Specifically, the Commission modified the *UNE Remand Order* less than one month after its release by permitting ILECs to deny EELs to requesting carriers unless such carriers will use them to carry a "significant amount of local exchange service." The Commission stated that this restriction would apply until final resolution of the *Fourth FNPRM*, which it assured parties would occur no later than June 30, 2000.[8]

Six months later, the Commission issued the *Supplemental Order Clarification*.[9] In this decision, the Commission recognized that the recent *CALLS Order* had removed the universal service subsidies in switched access charges.[10] Nevertheless, the Commission continued to suggest that EEL conversions implicate universal service concerns, while claiming that "a number of additional considerations" required an indefinite extension of the use

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6 *Id.* at ¶¶ 486-89.

7 *Implementation of the Local Competition Provisions of the Telecommunications* Act, Supplemental Order, FCC 99-370 (rel. Nov. 24, 1999) at ¶ 6. ("*Supplemental Order*").

8 *Id.* at ¶ 2.

9 On June 23, 2000, CompTel filed the instant appeal of the *Supplemental Order Clarification*, FCC 00-183, released by the Commission on June 2, 2000 in the proceeding captioned *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98 ("*Supplemental Order Clarification*").

10 *Id.* at ¶ 8.

restriction on EELs. Specifically, the Commission held that it needed more time to "gather evidence on the development of the marketplace for exchange access in the wake of the new unbundling rules adopted in the [*UNE Remand Order* to] determine the extent to which denial of access to network elements would impair a carrier's ability to provide special access services."[11] The Commission also claimed that an extension would give the Commission and the parties "more time to evaluate the issues raised in the record in the *Fourth FNPRM*"[12]; and it would avoid an "immediate transition to unbundled network element-based special access [that] could undercut the market position of many facilities-based competitive access providers."[13] The Commission also sought to provide more specificity on the nature and scope of the "significant amount of local exchange service" standard. Accordingly, the Commission held that a requesting carrier must satisfy one of three complex options before it could obtain an EEL from an ILEC and use it to provide telecommunications services.[14] The result is that a relatively simple use restriction intended to last for approximately six months became a complex set of restrictions with a life of their own.

Ever since issuing the *UNE Remand Order*, the Commission has charted a tortuous path towards ever more complicated use restrictions on EELs with increasingly vague and remote policy justifications. The Commission needs to return immediately to the path charted by Congress when it drafted Section 251 – no use restrictions on UNEs. As it is now evident to the Commission and the industry alike that EEL restrictions have no discernible tie to universal service, the only purpose served by EEL restrictions in today's market is to protect a

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11 *Id.* at ¶ 16.

12 *Id.* at ¶ 17.

13 *Id.* at ¶ 18.

14 *Id.* at ¶ 22.

monopoly revenue stream for the ILECs. This is a patently illegal policy. The ILECs have had more than five years since passage of the 1996 Act to get used to the reality of UNE combinations such as EELs, and the ILECs have had approximately eighteen months since the *UNE Remand Order* to adjust for the loss of special access revenues due to EEL conversions. The Commission must remove all EEL restrictions and do so immediately to promote telecommunications competition as intended by Congress.

I. USE RESTRICTIONS ARE UNNECESSARY AND WOULD NOT SERVE THE PUBLIC INTEREST

There is no rational public policy basis for imposing restrictions on the use of EELs. The use restrictions are not necessary to protect universal service, because there are no universal service support subsidies in special access (or even switched access) rates. The only effect of the use restrictions is to guarantee the ILECs a certain revenue stream from their tariffed special access services. However, protecting ILEC revenues is not a permissible policy objective for the Commission. Moreover, use restrictions are fundamentally inconsistent with the Commission's application of the impair standard, as well as its competitive policies. Certainly, the Commission cannot deny that the practical effect of its EEL restrictions has been to ensure that EELs are largely unavailable to requesting carriers for the past eighteen months. For these reasons, the Commission should immediately lift the use restrictions it imposed on an "interim" basis in the *Supplemental Order* and extended indefinitely in the *Supplemental Order Clarification.*

A. There Is No Universal Service Support In Interstate Access Charges.

The Commission's primary justification for extending the "interim" use restrictions in the *Supplemental Order Clarification* was its desire to preserve the special access

issue raised in the *Fourth FNPRM*. Specifically, the Commission claimed that "allowing use of combinations of unbundled network elements for special access could undercut universal service by inducing IXCs to abandon switched access for unbundled network element-based special access on an enormous scale."[15] However, there are no universal service subsidies built into the rates for special access (or even switched access) services.

The Commission has *never* prescribed specific rate elements for the ILECs' special access services, nor has it established any universal service support mechanisms in its special access orders.[16] To the contrary, ILECs have always enjoyed considerable flexibility in determining the pricing of individual special access products and services, provided an overall revenue requirement was met, without any built-in subsidies to support universal service. Of course, this flexibility was intended to enable ILECs to *lower* rates in response to "competitive pressures." To CompTel's knowledge, the Commission's primary motivation in special access policies has been to reduce special access rates closer to cost, not to keep them artificially high. The Commission has already found, and the ILECs themselves have agreed, that there are no universal service subsidies in special access rates, as CompTel demonstrated in its earlier comments in this proceeding.[17]

With respect to switched access services, the Commission removed universal service support from switched access rates a few days before it released the *Supplemental Order Clarification*. Specifically, as required by Section 254(e) of the Act, the Commission removed all implicit subsidies from the interstate access charge system and replaced them with a new

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15 *Id.* at ¶ 7.

16 *Access Charge Reform,* 14 FCC Rcd 14221, ¶ 8 (1999) (*Access Reform Fifth Order).*

17 Comments of the Competitive Telecommunications Association, CC Docket No. 96-98 (filed January 19, 2000) at 4-8.

subsidies in switched access rates.[22] Thus, the only effect of the EELs restriction is to protect the ILECs' special access revenue stream from competitive market conditions. However, the Commission itself has recognized that the protection of ILECs' revenues is not a legitimate policy objective under the 1996 Act.[23] Even before the 1996 Act, both the Commission and the Court of Appeals for the District of Columbia observed that "the goal of the agency 'is to promote competition . . . not to protect competitors.'"[24]

Further, there is no longer any need (if there ever was) to give the ILECs a transition period in order to adapt to the loss of revenues from supra-competitively priced special access services. The ILECs have already had over five years since passage of the 1996 Act – and 18 months since the *UNE Remand Order* – to adjust to a lesser revenue stream. These time periods are a more than generous transition period for the ILECs.[25] Under similar circumstances

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22 The amount of traffic that migrates from switched access to special access is irrelevant because there are no universal service subsidies in switched access rates. However, even if there still were implicit subsidies in switched access rates, the steep reduction in per-minute charges under CALLS reduces the incentives to migrate from switched access to special access. Accordingly, there is no empirical data of any kind to support speculation that unrestricted use of EELs will harm universal service through a migration of traffic from switched access to special access. Given that special access rates have been declining for a decade with no apparent harm to universal service, this empirical evidence obviously cannot be assumed.

23 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 725 ("*Local Competition Order*"), *aff'd in part, vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded, AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999) ("The fact that access or universal service reform have not been completed by that date would not be a sufficient justification [for extending the use restriction], *nor would any actual or asserted harm to the financial status of the incumbent LECs.*") (emphasis added).

24 *CompTel v. FCC* at 530, *quoting WATS-Related and Other Amendments of Part 69 of the Commission's Rules*, 59 RR 2d 1418, 1434-35 (1986).

25 The ILECs do not need financial protection, particularly in comparison with competitive carriers. *See, e.g.*, Vikas Bajaj, *Critics Call Telecom War an Unfair Fight*, DALLAS MORN. NEWS, <http://www.dallasnews.com/cgi-bin/print.cgi?story=http://www.dallasnews.com/technology/314675_babybells_18bu.html> (Mar. 18, 2001).

where the Commission claimed that it had "proceeded with caution" in order to "minimize rate shock for customers" and "impose the least burden upon the smallest competitors," the Court of Appeals for the District of Columbia held that the Commission had failed to justify the need to protect a subsidy that IXCs paid to ILECs.[26]

In addition to being unnecessary, protection of the ILECs' high special access rates actually destabilizes emerging competition in the special access market segment. The Commission recently granted several petitions for flexibility in the pricing of access services by certain ILECs.[27] These ILECs can now cross-subsidize their special access services subject to pricing flexibility where they face competition using revenue from high special access rates where they face no competition. Thus, the Commission has created the incentive and the ability for ILECs to engage in anti-competitive price discrimination through its use restrictions.

The impropriety of protecting ILEC revenue streams through use restrictions is highlighted by the Commission's decision not to protect the revenue streams of new entrants in other proceedings.[28] For example, the Commission is currently considering rules that would drastically curtail reciprocal compensation revenues for some CLECs in response to sustained challenges by the ILECs.[29] Similarly, the Commission is currently considering rules that would

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26 *Id.* at 529-32.

27 *See, e.g., BellSouth Petition for Phase I Pricing Flexibility for Switched Access Services*, CCB/CPD No. 00-21, FCC 01-76 (rel. Feb. 27, 2001); *BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD No. 00-20, DA 00-2793 (Rel. Dec. 15, 2000); *Petition of Ameritech Indiana, Ameritech Michigan, Ameritech Ohio, and Ameritech Wisconsin for Pricing Flexibility; Petition of Pacific Bell Telephone Company for Pricing Flexibility; Petition of Southwestern Bell Telephone Company for Pricing Flexibility*, CCB/CPD Nos. 00-26, 00-23, 00-25, DA 01-670 (rel. March 14, 2001).

28 *See, e.g., Access Charge Reform*, 14 FCC Rcd 14221 (1999).

29 *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 99-68 & 96-96.